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International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments: United Kingdom of Great Britain and Northern Ireland

A. General comments

The Government of the United Kingdom of Great Britain and Northern Ireland commends the International Law Commission and its Special Rapporteur for their work on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

The United Kingdom notes that the Commission has provisionally reached the conclusion that the draft principles should be adopted in a non-binding form. The Government of the United Kingdom firmly takes the same view. As the Commission has observed, the generality and the residual nature of the draft principles suggest that they are not suitable for codification or progressive development in the form of a legally binding instrument. The United Kingdom also considers that there are a number of respects elaborated below in which the draft principles do not represent the current state of the law and which we consider are too broadly stated to constitute a desirable direction for the *lex ferenda*.

The United Kingdom notes that the draft principles, though addressed to States at the international level, are primarily concerned with the provision of civil remedies in their own national legal systems in respect of the victims of transboundary harm from hazardous activities. The premise of the commentary, which we would support, appears to be that as the draft principles are not legally binding and concern the development of civil liability at the national level, their contravention would not give rise to State responsibility.

Nevertheless, the commentary does suggest that where a State is in breach of its obligations concerning the prevention of harm, there may be a claim under the international law of State responsibility "in addition to" claims for compensation envisaged by the draft principles. We would therefore request that the Commission consider a little further what relationship there may be between claims for State responsibility in respect of obligations of prevention and civil claims envisaged by the draft principles. For example, it may be helpful to consider how overlapping claims might be coordinated so as to ensure that double recovery is not possible.

B. Principle 1 — Scope of application

Draft principle 1 sets out in very broad terms the scope of application of the draft principles. The key elements appear to be that there is (a) transboundary damage (b) caused by activities not prohibited by international law (c) which involve a risk of causing significant transboundary harm. The United Kingdom considers that the first element (transboundary damage) should be more precisely correlative to the third element; that is, that the damage which occurs should be of the same nature as the risks adverted to in the third element; that is, that it should be foreseeable.

The Government of the United Kingdom notes that the draft principles are applicable in cases where the transboundary damage reaches the threshold of "significant" harm. While we recognize that this threshold has been adopted in certain other agreements (including, for example, the Convention on the Law of the Non-Navigational Uses of International Watercourses (General Assembly resolution 51/229 of 21 May 1997)), the United Kingdom notes that there is still relatively little practice in which it has been given further definition. We have some concern that, in the context of such a potentially broadly applicable regime as the present draft principles, the threshold of significant harm may be too vague a standard and may run the danger of setting the threshold too low. We would ask the Commission to consider further whether a clearer and higher threshold, such as "serious" harm, would be more appropriate.

C. Principle 2 — Use of terms

The United Kingdom notes that paragraph (a) (iii) of draft principle 2 includes the possibility of loss or damage to the environment per se being within the scope of the draft principles. In our view liability for the protection of the environment per se is a relatively recent concept, on which practice is confined to a few, very specific contexts. We consider that it raises some complex questions that are not fully addressed in the draft principles and the commentary. For example, the commentary suggests that it is primarily public authorities and perhaps certain public interest groups that have standing to bring such claims. However, in our view this may raise questions as to whether a civil liability regime is an appropriate means to consider questions of the broad public interest. Further, on the question of quantification of such loss, the commentary offers little guidance. We would urge the Commission therefore to consider the preceding and other relevant matters in more detail in the commentary.

D. Principle 3 — Objective

The Government of the United Kingdom recognizes that the objective of the draft principles set out in draft principle 3, namely that victims of transboundary damage should receive prompt and adequate compensation, broadly reflects principle 13 of the Rio Declaration on Environment and Development.[1]

However, we believe that the inclusion of States within the category of victims of transboundary damage is not appropriate. The inclusion of claims by States would, in our view, take the draft principles beyond a civil liability scheme for implementation in national law. We would not support any attempt to transpose the rules on civil liability contained in the present draft principles which concern civil claims primarily between private parties before national courts, in order that they might be applied to claims made by States as a matter of public international law.

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[1] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

E. Principle 4 — Prompt and adequate compensation

While the Government of the United Kingdom believes that it is important to set out the principles according to which compensation is payable, we have some concerns about the current formulation of draft principle 4. In the first place, we consider that the "polluter pays principle" ought to be the guiding principle in this respect, and we are surprised not to see more explicit reference to it in the text of draft principle 4. In particular, paragraphs 2 and 3 are not as clear as they might be in this respect when they refer to "the operator or, where appropriate, other person or entity".

Paragraph 2 of draft principle 4 appears to require the imposition of strict liability, without need for proof of fault. The Government of the United Kingdom accepts that in a number of particular fields, for example certain ultrahazardous activities, no-fault liability may have a role to play. The United Kingdom has accepted a number of specific international agreements where this is so, and at the level of national law additional schemes imposing strict liability in certain matters are in place where this is appropriate. In our view, therefore, the draft principles should be more flexible on this point, that is, endorsing the imposition of strict liability where it is appropriate, rather than its imposition across the board.

In relation to paragraph 3 of draft principle 4 concerning the requirement of compulsory insurance or other financial security for operators, the Government of the United Kingdom believes that the requirement is set out too rigidly at present. The availability of insurance for environmental matters should not be overestimated, and the additional burdens on industry that insurance or financial security schemes of a compulsory nature may represent should not be underestimated. A general requirement in respect of compulsory insurance or compulsory maintenance of financial security may therefore result in an unacceptably heavy burden on industry, and therefore the United Kingdom cannot support the proposal.

The Government of the United Kingdom is concerned that paragraph 5 of draft principle 4 suggests that there may be a degree of residual liability on the State to ensure that adequate financial resources are available to meet the costs of compensation. We note that it is not clear whether the reference is to the State of the victim or to the State in which the hazardous activity takes place. However, and in either event, we do not believe that such residual liability of the State represents the current state of international law. Nor do we believe that the imposition of residual liability of the State in this respect is appropriate, not least since it once again risks confusing principles applicable to claims in civil liability with those applicable to claims between States in public international law.

Finally, in relation to the remedial provisions in draft principle 4, we note that there is no reference to the possibility of a requirement that the operator must take remedial action in respect of environmental damage. In that respect we note the provisions of the Environmental Liability Directive of the European Parliament and of the Council of the European Union (2004/35/CE), which includes the provision that the competent authorities of the State may require an operator actually to take remedial measures. While such provisions may be beyond the scope of a classic civil liability scheme, in our view, in certain cases compensation alone, without the possibility of requiring that action be taken by the operator to remedy the damage,

may be insufficient. We would therefore ask the Commission to give further thought to this issue.

F. Principle 5 — Response measures

We note that draft principle 5 appears to be directed to response measures that the State should take. Again it is not clear whether the principle envisages action to be taken by the State in which the hazardous activity takes place or by the State of the victim. It is also not clear whether the Commission is proposing a legal duty on the State to take response measures nor, if so, whether it is a duty that is intended to be owed to its nationals as a matter of national law or a duty that is intended to be owed as between States at the level of international law.

G. Principle 6 — International and domestic remedies

In relation to draft principle 6, the Government of the United Kingdom has some concerns about the apparent breadth of the provision which suggests that States should provide domestic remedies to victims of transboundary damage. In relation to paragraph 1 of draft principle 6, it is not clear upon which State the proposed requirement to provide appropriate procedures to victims might fall, that is, the State of the victim or the State in which the hazardous activity takes place. Indeed, the commentary suggests that the proposed duty falls on "all States". This may be contrasted with paragraph 3 of draft principle 6, which the commentary suggests is aimed primarily at the State of origin of the damage (i.e., the State in which the hazardous activity takes place). Such cases may raise complex questions of private international law, and we cannot be certain that administrative and/or judicial procedures would necessarily be available to victims in all of the circumstances potentially covered in draft principle 6. We believe that the provisions of draft principle 6 should be qualified to the extent that they are compatible with accepted principles of private international law in the forum State.

H. Principle 7 — Development of specific international regimes

The Government of the United Kingdom notes that draft principle 7, which encourages States to develop international agreements on prevention and compensation, also reflects principle 13 of the Rio Declaration on Environment and Development. Nevertheless, as the Special Rapporteur has observed in his earlier work on the topic, experience suggests that legally binding liability regimes at the international level are complex and time-consuming to negotiate and that in many cases they have met with little success. We therefore urge the Commission to redraft principle 7 in a more flexible form, recognizing that a range of international instruments and/or other arrangements may be developed as appropriate. They may include formal international agreements where appropriate as well as non-binding arrangements between States and binding or non-binding arrangements between private actors, such as industry-wide agreements or codes of practice.

I. Principle 8 — Implementation

Finally, the Government of the United Kingdom considers that draft principle 8 on implementation is miscast in an instrument of this nature, which is more appropriately viewed as guidance for national policymakers rather than as a series of obligations requiring implementation.